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NO. 90-5551

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

EDWARD HAROLD SCHAD, JR.,
Petitioner,

-vs-

STATE OF ARIZONA,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division Division

R. WAYNE FORD
Counsel of Record
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment to the United States Constitution require that the jurors in a first-degree murder trial be instructed on and given forms of verdict for both premeditated and felony murder when, under established state law, murder is only one crime regardless of the manner in which the act was committed?

2. Does the Fourteenth Amendment to the United States Constitution require a state trial court to instruct the jurors in a capital murder trial with respect to a nonexistent lesser-included offense?

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OPINION BELOW

On December 14, 1989, the Arizona Supreme Court affirmed petitioner's conviction for first-degree murder and sentence of death. State v. Schad, 163 Ariz. 411, 788 P.2d 1162 (1989). Petitioner's motion for reconsideration was denied on April 18, 1990, and the mandate issued on April 19, 1990.

STATEMENT OF JURISDICTION

On April 18, 1990, the Arizona Supreme Court declined petitioner's motion for reconsideration of the court's opinion affirming the conviction and sentence. Petitioner was granted an extension of time within which to file the pending petition. Said petition was filed on August 16, 1990. This Court's jurisdiction vests pursuant to the United States Constitution, article III, § 2; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution.

> **§ 1. Citizenship rights not to be abridged by states**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Arizona, article II, § 23.

> **§ 23. Trial by jury; number of jurors specified by law**
>
> Section 23. The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.
>
> Amendment approved election Nov. 7, 1972, eff. Dec. 1, 1972.

STATUTORY PROVISIONS INVOLVED

Former Arizona Revised Statutes Annotated § 13-451, now Arizona Revised Statutes Annotated § 13-1105(A)(1).

§ 13-451. Murder and malice aforethought defined

A. Murder is the unlawful killing of a human being with malice aforethought.

B. Malice aforethought may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Former Arizona Revised Statutes Annotated § 13-452, now Arizona Revised Statutes Annotated § 13-1105(A)(2).

§ 13-452. Degrees of murder

A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree. As amended Laws 1973, Ch. 138, § 1.

Arizona Revised Statutes Annotated § 13-453.

§ 13-453. Punishment for murder

A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.

B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

STATEMENT OF THE CASE

Seventy-four-year-old Lorimer "Leroy" Grove left his home in Bisbee, Arizona, on August 1, 1978, bound for Everett, Washington, to visit his sister. His badly decomposed body was discovered 9 miles south of Prescott, Arizona, on August 9, 1978. He had been strangled to death by a rope that was tied around his neck. Positive identification of Mr. Grove was not accomplished until October 11, 1978.

Petitioner was arrested in Salt Lake City, Utah, on September 8, 1978, for violating parole for a prior murder conviction in that state. Petitioner possessed Mr. Grove's Cadillac at the time of his arrest, as well as Mr. Grove's wallet and credit cards. Further investigation disclosed that petitioner had been stopped for speeding in Mr. Grove's Cadillac in New York State. He explained to the trooper that he was delivering the car to a Mr. Grove, who lived nearby. Also, a car rented by petitioner and reported as stolen was found near Flagstaff, Arizona, on August 3, 1978. Several items identified as belonging to Mr. Grove were discovered in that vehicle.

The Yavapai County Grand Jury returned an indictment on December 14, 1978, charging petitioner with one count of first-degree murder:

> On or about August 1, 1978, EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§ 13-451, 13-452, as amended and 13-453(A), as amended.

Petitioner was convicted by a jury of first-degree murder, and following the required special verdict, was sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence and this Court denied certiorari. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982).

Petitioner was successful in applying for post-conviction relief. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, petitioner was retried and again convicted of first-degree murder. The trial court again held that the aggravating factors mandated the death penalty, the Arizona Supreme Court again affirmed the conviction and sentence. State v. Schad, 163 Ariz. 411, 788 P.2d 1162 (1989). Petitioner again seeks review of his conviction by this Court by a pleading dated August 16, 1990.

ARGUMENTS

I

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A UNANIMOUS VERDICT IN STATE CRIMINAL PROCEEDINGS. EVEN IF SUCH A REQUIREMENT EXISTS, IT WAS SATISFIED IN THE PRESENT CASE.

Petitioner contends that the Sixth Amendment to the United States Constitution requires jury unanimity in a capital trial in state courts, not only with respect to the offense charged but to the specific manner in which the defendant committed the offense as well. He argues that a less-than-unanimous verdict allows for a less-than-majority

vote to decide guilt in a capital case. Respondent submits that there is no constitutional requirement of unanimity for state court criminal proceedings and if there was, such a requirement was satisfied in the present case.

Petitioner's theory rests on this Court's decisions in Johnson v. Louisiana, 406 U.S. 356 (1972), Apodaca v. Oregon, 406 U.S. 404 (1972), and Rule 31(a), of the Federal Rules of Criminal Procedure, which requires a unanimous verdict in federal criminal trials. A few federal circuit courts have interpreted the above authority to require unanimity of verdict where the accusation is based on more than one possible act. See United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) (embezzlement); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (extortion); United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (sale or receipt of stolen vehicle). A few states have adopted the federal rule where the state constitution, statute, rule of procedure, or case law conforms with federal law. State v. Boots, 308 Or. 371, 780 P.2d 725 (1989).

However, as the Johnson and Apodaca opinions recognize, the Sixth Amendment does not require unanimity of verdict with respect to state criminal proceedings. Justice Powell concluded that jury unanimity is not "in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth

Amendment." Johnson v. Louisiana, 406 U.S. at 373 (Powell, J., concurring). The decision on unanimity of verdict is thus left to the states.

In Arizona, article II, § 23 of the state constitution mandates the unanimous consent of the jurors to render a guilty verdict in a criminal trial. With respect to the crime of first-degree murder, the Arizona Supreme Court has consistently held:

> Appellant raises the argument that he was denied the right to a unanimous jury verdict as guaranteed by Ariz.Const. Art. 2, § 23 because the court failed to give a form of verdict for guilty of premeditated murder and one for guilty of felony murder and none for guilty of first degree murder generally. The theory is that with the forms of verdict given, some jurors could have found him guilty of premeditated murder but not felony murder while the rest could have found him guilty of felony murder but not premeditated murder. Thus, he would be convicted of first degree murder even though the jury could not unanimously agree on what kind of first degree murder he committed.
>
> Although the scenario described by appellant could have occurred, we are not persuaded that he was thereby denied any right. In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. See State v. Axley, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, State v. Counterman, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed. See Counterman, supra, (where two assaults occurred as part of a continuous course of conduct during the same episode giving rise to one charge of assault with a deadly weapon, the right to a unanimous jury verdict did not require the state to elect which assault it would rely on to support a conviction); State v. Dixon, 127 Ariz. 554, 622 P.2d 501 (App.1980) (because A.R.S. § 13-1802 defines only one crime--theft--which can be committed in more than one way, Art. 2, § 23 only requires one form of verdict for theft and not one form for each way in which theft can be committed). Even if the events appellant describes occurred, he was still convicted of first degree murder by a unanimous verdict.

State v. Encinas, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982). Since there is but one crime, there is but one verdict; guilty or not guilty of first-degree murder (notwithstanding any lesser-included offenses and affirmative defense verdicts possible under the facts of each case). State v. Arnett, 158 Ariz. 15, 19-20, 760 P.2d 1064, 1068-69 (1988). State v. Emery, 141 Ariz. 549, 551-52, 688 P.2d 175, 177-78 (1984). Under the same rationale, the state is not required to elect between premeditated and felony murder theories when charging or proving first-degree murder, State v. Walton, 159 Ariz. 571, 578, 769 P.2d 1017, 1024 (1989), aff'd on other grounds, Walton v. Arizona, ___ U.S.___, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), nor is the trial court required to instruct the jurors and submit verdicts on alternate theories. State v. Gillies, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983).

The Arizona Supreme Court quoted Encinas in the opinion below. State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989). In doing so, it reaffirmed its interpretation of state law that the state constitutional mandate for unanimity is satisfied by the single verdict of guilty even where the issue is submitted on alternate theories of conduct.

Since there is no federal right applicable to the states on this point, the issue is left for the interpretation of state law by state courts. This state court's opinions recognize the right to a unanimous verdict and assure that criminals are not deprived of that right. In this case, the state court held that petitioner's verdict was unanimous on the crime charged: first-degree murder. Absent any federal constitutional law mandating that jury verdicts reflect the precise act that caused the resulting offense, nothing more is required. There is no constitutional basis on which petitioner can receive certiorari relief.

II

UNDER ARIZONA LAW, THERE IS NO LESSER-INCLUDED OFFENSE TO THE CRIME OF FELONY MURDER. THEREFORE, THE TRIAL COURT DID NOT DENY PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT.

Petitioner's other contention of constitutional error concerns what he describes as a due process right to an instruction and verdict form on a lesser-included offense in this, a capital case. He challenges Arizona's rule of law that there is no lesser-included offense to the crime of felony murder. Respondent submits that this issue of state law does not violate petitioner's Fourteenth Amendment due process rights in any way.

Petitioner relies on this Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), for his contention that, in a capital case, when the evidence supports a verdict of a

lesser-included noncapital offense, the jurors must be able to consider that offense. Beck is not applicable to Arizona law. In this state, the crime of felony murder includes no lesser offenses. State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572, cert. denied, 108 U.S. 207 (1987); State v. Arias, 131 Ariz. 441, 443-44, 641 P.2d 1285, 1287-88 (1982). As explained by the Arizona Supreme Court:

> We do not consider Beck applicable to § 13-1105(A)(2) [formerly Ariz. Rev. Stat. Ann. § 13-452] for several reasons. Beck only dealt with the constitutionality of imposing the death sentence where the jury is not allowed to consider the option of finding the defendant guilty of a lesser included offense. The Alabama statute involved in Beck specifically indicated that the requisite intent to kill could not be supplied by the felony murder doctrine. As was stated by the Court, "[f]elony murder is thus a lesser included offense of the capital crime of robbery-intentional killing. However, under the statute [Ala.Code § 13-11-2(a)] the judge is specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense." 447 U.S. at 628, 100 S.Ct. at 2384-85. Under Arizona law, however, there is no lesser included homicide offense of the crime of felony murder since the mens rea necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony. See State v. Ferrari, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975). It was not error to refuse defendant's requested instructions.

Id. For the reasons stated, there is no due process violation for failure to instruct on a nonexistent lesser-included offense.

CONCLUSION

There is no constitutional right to a unanimous verdict with respect to the specific acts engaged in by petitioner that constitute the offense of first-degree murder. The verdict in this case satisfies the state law of unanimity. Where there is no lesser-included offense as a matter of state law, no lesser-included offense instruction is permitted. Petitioner has not presented any constitutional basis which would justify review by this Court. Therefore, respondent asks that the petition be denied.

DATED this 14th day of September, 1990.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

R Wayne Ford

R. WAYNE FORD
Counsel of Record
Assistant Attorney General

Attorneys for RESPONDENT

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 14th day of September, 1990, to:

JOHN M. BAILEY
Arizona Capital Representation Project
Arizona State University
College of Law
Tempe, Arizona 85287-0604
Attorney for PETITIONER

R Wayne Ford

R. WAYNE FORD
Counsel of Record
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for RESPONDENT

CR25-217
4631D map (M)

Attorney General
1275 WEST WASHINGTON
Phoenix, Arizona 85007
Robert K. Corbin

September 14, 1990

The Hon. Joseph F. Spaniol, Jr., Clerk
United States Supreme Court
Office of the Clerk
Washington, D.C. 20543

Re: EDWARD HAROLD SCHAD, JR. vs. STATE OF ARIZONA
No. 90-5551

Dear Mr. Spaniol:

Enclosed please find for filing the original and 12 copies of the Response to Petition for Writ of Certiorari in EDWARD HAROLD SCHAD, JR. vs. STATE OF ARIZONA, No. 90-5551.

Thank you for your attention to this matter.

Sincerely yours,

ROBERT K. CORBIN
Attorney General

R Wayne Ford

R. WAYNE FORD
Assistant Attorney General

RWF:map
Enclosure

4631D